SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-766

DONALD WALLACE, et al.,

Petitioners,

against

MICHAEL KERN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit which petitioners seek to review is reported at 499 F. 2d 1345, and is reproduced in petitioners' appendix at page 1a. The decision of the United States District Court for the Eastern District of New York which was reversed by the Court of Appeals, is reported at 371 F. Supp. 1384, and appears in petitioners' appendix at page 18a. The order of the District Court granting preliminary relief is not reported, and appears in petitioners' appendix at page 13a.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Court of Appeals decision was rendered on July 8, 1974. Petitioners' motion for rehearing *en banc* was denied by the Court of Appeals on August 21, 1974. This Court extended petitioners' time to apply for certiorari until December 19, 1974.

Question Presented

Whether the Court of Appeals properly held that the District Court had no power to establish a speedy trial rule for state pre-trial detainees, based solely on a fixed number of months that the detainees had been incarcerated prior to trial?

Statement of the Case

This action was commenced on June 30, 1972 by a group of pre-trial detainees in Kings County, New York, who alleged that their constitutional rights in pending criminal prosecutions had been violated by the conduct of six justices of the Kings County Supreme Court. On July 11, 1972 the District Court permitted the petitioners to proceed *in forma pauperis,* and on July 20, 1972, the District Court assigned counsel to represent petitioners. On August 1, 1972 the District Court directed petitioners to confine their allegations to patterns and practices of the state court, and not to the conduct of individual judges.

On October 16, 1972 petitioners filed their first amended complaint against all of the Justices of the Kings County Supreme Court. The complaint contained seven causes of action and alleged that petitioners were being subjected to lengthy delays before trial, excessive bail, ineffective assistance of assigned counsel, denial of opportunities to present

pro se motions to the state court, coerced guilty pleas and non-production in court by the correction department. On November 14, 1972 the respondent Justices of the state court moved to dismiss the complaint. Before this motion was heard the case was re-assigned to another district judge, and the petitioners filed a second amended complaint on January 29, 1973. This complaint contained eight causes of action and alleged, in addition to the allegations in the first amended complaint, that Kings County detainees were being subjected to cruel and unusual punishment and were being denied the equal protection of the law by reason of their lengthy incarceration prior to trial, due to their inability to post bail.

On February 2, 1973 the respondent Justices moved to dismiss the second amended complaint, and on February 13, 1973 the District Judge heard oral argument on the motion, at the Brooklyn House of Detention. The District Judge reserved decision on all aspects of the motion, except as to the portions of the complaint which complained of ineffective assistance of assigned counsel and the refusal of the state court to entertain pro se motions where a detainee was represented by an attorney. The District Judge ordered an immediate hearing on these issues, and testimony was taken on February 21 and 23, 1973. Shortly thereafter, on February 27, 1973, the District Court rendered a decision denying the motion to dismiss the remainder of the second amended complaint, and holding that it had jurisdiction under 42 U.S.C. § 1983 to entertain petitioners' claims about the criminal justice system in Kings County. On March 29, 1973 the District Court issued an order permitting petitioners to maintain the case as a class action.

On April 30, 1973 the District Court conducted a further evidentiary hearing on the control of the criminal calendar in the Kings County Supreme Court. This hearing was held in conjunction with the case of *McLaughlin* v. *Justices of the Supreme Court, Kings County,* a pro se civil rights

action that was similar to the instant case. On May 10, 1973 the District Court rendered a lengthy decision in both cases, granting a preliminary injunction in favor of petitioners on the issues of effective assistance of counsel and pro se motions. The District Court ordered the clerk of the Kings County Supreme Court to place all pro se petitions on the court's motion calendar, and ordered the Legal Aid Society to limit its caseload to forty cases per attorney.

This order was immediately appealed by the respondent Justices and by the Legal Aid Society to the Court of Appeals for the Second Circuit. On June 27, 1973 that Court ruled from the bench that the District Court had exceeded its jurisdiction under 42 U.S.C. § 1983 by granting relief against the Legal Aid Society, a private organization, and had exceeded its authority under the doctrine of comity by ordering the clerk of a state court to place motions on the court's calendar (481 F. 2d 621). On January 7, 1974 this Court denied certiorari (414 U.S. 1135).

On July 20 and 25, 1973 the District Court conducted evidentiary hearings on petitioners' cause of action relating to speedy trials. The District Court heard testimony from three detainees, a psychiatrist, a former Legal Aid supervisor and a criminal law expert. The District Court also heard testimony from the Assistant Administrative Judge of Kings County, on behalf of the respondent Justices. Essentially their testimony was as follows.

Bernard L. Segal, a defense lawyer and professor of law, testified that delays in bringing cases to trial resulted in five areas of prejudice to a criminal defendant: (1) denial of a constitutional right that can never be regained; (2) oppressively lengthy pre-trial incarceration; (3) anxiety and other psychological problems arising from uncertainty and delay; (4) deterioration of relationship with counsel; and (5) acceptance of less than full constitutional rights. Segal testified that lengthy pre-trial confinement inhibits an accused person's preparation of his case, causes him to

lose his job or seniority rights, impedes his relationship with his attorney and family, and causes him to plead guilty rather than wait for a trial. Mr. Segal suggested that detainees be released on their own recognizances if their cases were not tried within six months, and that defense attorneys be limited in their caseloads to twenty-five felony cases per lawyer.

Dr. Sheldon Cholst, a psychiatrist at the Brooklyn House of Detention, testified that lengthy pre-trial delays caused anxiety, uncertainty and resentfulness on the part of the inmates, and caused them to experience a higher than average rate of suicides and mental breakdowns. He said that this anxiety would be reduced if the inmates knew that their cases would be brought to trial within a definite period of time.

Samuel Dawson, a former Legal Aid supervising attorney, testified that in a number of the trial parts in Kings County, the cases that had been tried most recently were not the oldest cases on the court's calendar, although he did not know the reason why the newer cases were tried before the older cases. Dawson said that as a result of several hundred habeas corpus applications, the Legal Aid Society and the District Attorney had agreed on guilty pleas in more than two hundred cases, but that the remaining cases were not tried more quickly. He said that the expansion of trial parts that were manned by the Legal Aid Society had not resulted in speedier trials, and that the total number of trials in 1973 would probably be less than the total number in 1972.

Justice Vincent Damiani, the Assistant Administrative Judge in charge of the criminal parts of the Kings County Supreme Court, testified on behalf of the respondent Justices. He stated that the court had taken many steps to reduce its backlog of criminal cases, including the establishment of conference parts to screen out cases in which a defendant was willing to plead guilty, the institution of

a digital system based on a defendant's indictment number to insure that the defendant was continuously represented by the same Legal Aid attorney, the use of state probation officers to eliminate the backlog of cases awaiting probation reports, the assignment of judges to the Brooklyn House of Detention to handle arraignments, the assignment of a judge to the Brooklyn House of Detention in December, 1972 to handle bail conferences, the reduction of the Legal Aid Society's caseload to forty cases per lawyer, and the institution of a system whereby detainees were permitted to seek bail review by writing a letter to the court.

Justice Damiani further testified that the workload of the court had been reduced in 1973 due to a decrease in the number of pending cases and an increase in the number of criminal term parts. He said that during the first six months of 1973 the number of pending indictments had been reduced by 941 and the number of defendants awaiting trial had been reduced by 1,471. At the same time the number of criminal term parts had been increased from twenty in September, 1972 to thirty-one in September, 1973, including five narcotic parts. (The New York Law Journal of January 27, 1975 indicates calendars for thirty-eight criminal term parts in Kings County, including narcotics parts, conference parts and a motion part). Justice Damiani also testified that renovations had been completed on the third floor of the court house, which would increase the court's capacity to handle detainees.

On March 7, 1974, nearly eight months after the hearing on the speedy trial issue was concluded, the District Court rendered the decision which is the subject of the instant petition for certiorari. The District Court relied on the testimony of petitioners' experts concerning the harmful effects of pre-trial incarceration, and noted that there were cases in Kings County where detainees had been in jail for sixteen to twenty-two months before their cases were dis-

posed of by guilty pleas. The District Court concluded that state remedies to obtain a speedy trial were largely ineffective because the District Attorney could try cases out of chronological order, the New York courts were hostile to class actions, the New York Court of Appeals in a test case, *People ex rel. Franklin* v. *Warden*, 31 N Y 2d 498, 294 N.E. 2d 199 (1973), had granted preferences to only four defendants, and private attorneys were not adequately compensated or supervised by the state court. The District Court also relied on the testimony at hearings in two jail cases which were pending before the District Judge, but in which the respondent Justices were not parties, and relied on the observations of the District Judge's law clerk, who visited the Kings County Supreme Court on March 4, 1974. The Court noted that the overall situation had improved since May, 1973, but it still fell short of the requirement of speedy trials.

The District Court ruled that petitioners were entitled to a preliminary injunction, subject to a showing by the respondent Justices at trial that the injunction should not be made permanent. The District Court held that dismissal of indictments would not be a proper remedy, but that each detainee who had been in jail more than six months would be entitled to request a speedy trial, and to be released on his own recognizance if not brought to trial within forty-five days. The District Court set up a timetable whereby its order would apply immediately to any detainee who had been incarcerated more than one year, within forty-five days to any detainee who had been in custody more than nine months, and within ninety days to any detainee who had been in custody more than six months. (See petitioners' appendix #3, 18a-35a).

On March 7, 1974, the same day that the District Court filed its decision, the District Attorney of Kings County forwarded an updated report to the court, indicating further significant reductions in the caseload of the Kings County Supreme Court. The report showed that the num-

ber of pending indictments had been reduced by 41% since January, 1973, and that the number of defendants awaiting trial had been reduced by 47%. The report also showed that the number of incarcerated defendants had been reduced by 44% between January, 1973 and March 1, 1974, and that the number of detainees incarcerated more than six months had been reduced by 38%. On March 8, 1974 the District Court issued a supplemental memorandum, stating that the District Attorney's report showed substantial progress in reducing the backlog of criminal cases, but that the overall effect of the report was to confirm the District Court's decision.

On March 26, 1974 the District Court issued an order implementing the decision of March 7, 1974. The District Court directed that all detainees awaiting trial in Kings County for more than six months could make a written request to the clerk of the Kings County Supreme Court for a speedy trial. If the request was not acted upon within forty-five days, the clerk (not a judge) was directed to notify the New York City Correction Department to release the detainee from custody. The order specified that a nine month rule rather than a six month rule would apply to murder indictees, and that delays caused by any indictee would be chargeable to him only during the forty-five day period after a request for a speedy trial had been made, but not during the initial six months or nine months (See petitioners' appendix # 2, 13a-17a).

On March 29, 1974 the District Court granted a temporary stay of its order, and on April 2, 1974 the Court of Appeals granted a permanent stay and directed that the appeal be heard during the week of April 22, 1974. The Court of Appeals heard oral argument on April 25, 1974 and rendered a decision on July 8, 1974, reversing the decision of the lower court and vacating the lower court's judgment. The Court of Appeals held that the speedy trial order ran afoul of this Court's decision in *Barker* v.

Wingo, 407 U.S. 514 (1972), in a number of significant respects, and that the District Court had no authority to establish a rule of practice for the state court. The Court of Appeals stated that federal courts must limit their inquiry in speedy trial cases to the specific facts regarding a complaining petitioner, and that relief from unconstitutional delays was not available in wholesale lots.

Petitioners then moved in the Court of Appeals for rehearing *en banc,* and their motion was denied on August 21, 1974.

REASONS WHY CERTIORARI SHOULD BE DENIED

The Court of Appeals correctly reversed the decision and order of the District Court. The speedy trial rule that was fashioned by the District Court was contrary to the principles enunciated in *Barker* v. *Wingo,* and was an unwarranted intrusion into the operation of the State Court.

In *Barker* v. *Wingo,* 407 U.S. 514 (1972), this Court analyzed the interests that were involved in assaying a criminal defendant's constitutional right to a speedy trial, and formulated a balancing test in which the defendant's rights were weighed against the rights of the public and the difficulties in running a court system. In the instant case the District Court ignored the balancing test of *Barker* and formulated a speedy trial rule that violated the principles of *Barker* in three respects: first, the District Court established a fixed time limit for bringing cases to trial; secondly, the District Court granted relief to an entire class rather than on a case-by-case basis; thirdly, the District Court ruled that delays caused by an accused would be chargeable to him only after the six months or nine months period prior to a request for a speedy trial, but not before that time. To appreciate the gravity of these errors a brief examination of *Barker* is necessary.

In *Barker* this Court noted that the speedy trial right was generically different from the other constitutional rights for the protection of the criminally accused, because the societal interest in speedy trials was separate from and, at times, in opposition to, the interests of the accused; because deprivation of the speedy trial right may work to the accused's advantage; and because the right to a speedy trial was a more vague concept than other procedural rights (See 407 U.S. at 519-21). This Court noted that it would be tempting to adopt either of two rigid approaches to eliminate the uncertainty surrounding the speedy trial right, but it declined to do so. Instead it held that a rule based on a fixed period of time could be adopted by federal and state courts as a matter of internal procedure, but it was not required by the Constitution because the speedy trial right could not be quantified into a fixed number of days and months (See 407 U.S. at 523). This Court also rejected a demand-waiver rule, whereby the accused would have waived his speedy trial right during any period of time that he did not ask for a trial. This Court believed that such a rule was inappropriate because the accused had no obligation to bring himself to trial, and because defense counsel would be placed in a difficult position in requesting more time to prepare a case.

This Court established a balancing test to evaluate the competing interests that were involved in speedy trial cases. Such a test required an *ad hoc* approach rather than a broad approach, and rested on four critical factors: length of delay, reason for delay, the accused's assertion of his speedy trial right, and prejudice to the accused.

With respect to length of delay this Court said that until there was some delay which was presumptively prejudicial, there would be no need to inquire into the other factors of the balancing test. However, whether a delay was presumptively prejudicial depended on the facts and circumstances of each case, and not on a fixed period of time.

With respect to the reasons for the delay, this Court again rejected an inflexible rule, and held that different weights should be assigned to different reasons. Thus a deliberate attempt to delay a trial was to count more heavily against a prosecutor than delay caused by overcrowded courts or absent witnesses.

With respect to the accused's responsibility to assert his speedy trial right, this Court stated that a demand for a speedy trial was entitled to strong evidentiary weight, and that failure to assert the right would make it difficult for an accused to prove that he was denied a speedy trial. With regard to prejudice to the accused, this Court noted that there were three interests which the speedy trial right was designed to protect: prevention of oppressive pretrial incarceration; minimization of anxiety and concern; and limitation of impairment of an accused's defense by reason of delay. The third factor was considered the most critical because the inability of an accused to prepare his case undermines the fairness of the criminal justice system.

Finally, this Court reiterated its fundamental position that none of the four factors was either a necessary or sufficient condition to the finding of a deprivation of the speedy trial right, and that none of the four factors had "talismanic qualities". Rather the four factors were to be considered together with other circumstances as may be relevant, and the lower courts were required to engage in a "difficult and sensitive balancing process" (See 407 U.S. at 533).

In light of this clear elucidation in *Barker* v. *Wingo* of the many considerations that are involved in deciding speedy trial claims, it becomes manifest that the District Court's order in the instant case was properly reversed by the Court of Appeals. Rather than engage in the sensitive balancing process that was required by this Court, the District Court created a fixed rule based on a period of six months or nine months, regardless of the facts of indi-

vidual cases. Furthermore the District Court granted relief to an entire class of detainees rather than to individual detainees, thus decreasing the opportunity for review of speedy trial claims on an *ad hoc* basis. The District Court's order made no provision for consideration of the four factors enunciated in *Barker*, and provided that detainees would be released from custody on orders of the court clerk, rather than on orders from a state judge after a hearing on a speedy trial motion. The District Court's order was an obvious attempt to establish a rule of practice for the Kings County Supreme Court, in direct contravention of the admonition in *Barker* that this Court would not "establish procedural rules for the States, except when mandated by the Constitution" (407 U.S. at 523).

The District Court's order also violated *Barker* by failing to hold an accused responsible for delays caused by the accused during the initial six month or nine month period prior to a speedy trial request. In *Barker* this Court noted that by requiring the accused to assert his speedy trial right, a trial court may "attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection" (407 U.S. at 529). In the instant case the District Court's order failed to provide for a situation where the accused delays his case for the initial six or nine months period, and then requests a speedy trial when the proof has become stale or the witnesses harder to locate. In addition, as noted by the Court of Appeals, the District Court's order contains the demand-waiver rule that was rejected by this Court, because a detainee who did not make a written request for a speedy trial after six or nine months would be in no position to claim the benefits of the speedy trial decree.

Finally, although the District Court stopped short of dismissing indictments as a means of enforcing the speedy trial right (but *cf. Strunk* v. *United States,* 412 U.S. 434 [1973]), the distinction between dismissing indictments and releasing detainees on their own recognizance is meaningless because each exerts the same pressure on the prosecutor to bring the detainees to trial. Indeed the intention of the District Court to accomplish this purpose was made manifest by its statement that, "The risk to the [respondent Justices] and the public from the release of a dangerous defendant or one who may abscond, can be avoided by providing appropriate procedures and personnel to bring him to trial promptly" (Petition, 32a). Thus petitioners' arguments that the District Court's order was merely an equitable remedy designed to protect the speedy trial right (p. 10), or that it was "conservative" in nature (p. 11), cannot overcome the obvious difficulty that the District Court was forcing the state to bring an entire class of detainees to trial within a fixed period of days and months.

The District Court's order was also properly vacated by the Court of Appeals because it represents an example of the intrusion into state criminal proceedings that was condemned by this Court in *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). In *O'Shea* this Court noted that "[a] federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable" as an ongoing federal audit of state criminal proceedings (see 414 U.S. at 500). This Court warned of "unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts." In the instant case the implementation of the District Court's speedy trial rule would have resulted in an audit by the District Court of all speedy trial claims made by Kings County detainees, since the District Court's order would have superseded the motion procedures of the state court. The District Judge would have been required to determine

whether hundreds of detainees were entitled to be released from custody under the formula contained in the preliminary injunction, since the order contained no provision for review of speedy trial claims by the state judges. This type of daily involvement in state criminal proceedings is precisely what this Court was opposed to in *O'Shea* and in the other leading cases on federal intervention. E.g. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

In sum, the judgment of the District Court was properly vacated by the Court of Appeals because it failed to follow the principles enunciated by this Court in *Barker* v. *Wingo*, *supra*. As the Court of Appeals stated in its decision, speedy trial issues should be decided on a case-by-case basis, and relief should not be granted in wholesale lots. The District Judge fashioned the wrong remedy to deal with a complex problem, and erroneously intervened into the internal procedures of the state court.

CONCLUSION

Petitioners' application for certiorari should be denied in all respects.

Dated: New York, New York, January 29, 1975.

Respectfully submited,

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